KAYLA BEVERLY HILLS (M) SDN BHD & ANOR

v.

QUANTUM FAR EAST LTD & ORS;
UMA DEVI R BALAKRISHNAN (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI MAKINUDIN J
[CIVIL SUIT NO: D3-22-1707-2002]
30 JULY 2003

LEGAL PROFESSION: *Liability as fiduciary - Conflict of interest and duty - Counsel for third party acting for plaintiffs in another related suit - Third party also gave conflicting evidence in both suits - Whether counsel should be disqualified from representing third party - Legal Profession (Practice and Etiquette) Rules 1978, rr. 5(a) & 5(b)(i)*

This was an application by the third, fourth and fifth defendants ('the defendants') to disqualify counsel, one Mr Dev and his law firm, from representing the third party in this action. The defendants contended that Mr Dev could not act for the third party when he was acting for the plaintiffs herein in another related suit ('the other suit'). Furthermore, the third party had given conflicting evidence on oath in both suits.

Held:

[1] Order 16 r. 4(4) of the Rules of the High Court 1980 ('RHC') allows the court to give such directions to the third party to defend the suit whether alone or jointly with any defendant. The necessary consequence of O. 16 r. 4(4) is that the third party can, at the trial, cross-examine the plaintiffs and seek discovery against and interrogate the plaintiffs. In essence, the plaintiffs and the third party are on opposing sides much the same way as the plaintiffs and the defendants are on opposing sides. This is further evidenced by the fact that the third party notice issued herein was in accordance with Form 22 RHC which states that the third party is allowed to dispute the plaintiff's claim against the defendant or dispute the defendant's claim against the third party. (p 589 g-h & 590 a)

[2] The other suit was part heard and still pending. Mr Dev continued to remain as counsel on record. There was little doubt that he would come into confidential information. He did not show how he intended to avoid the obvious conflict. He also produced no evidence to rebut the inference that there would be disclosure of information. Further, the conflict of

interest was more apparent as he sought to act for both the plaintiffs and the third party in related cases at the same time. Rule 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978 prohibits an advocate and solicitor from accepting a brief if it would be difficult for him to maintain his professional independence. (pp 591 c-f, 592 g, 593 c & 594 e)

[3] There would be no prejudice to the third party in the event Mr Dev was disqualified from representing her as she would be at liberty to retain other solicitors. Conversely, to allow Mr Dev to continue to act for the third party would raise serious questions relating to a breach of confidence, conflict of interest and ultimately the due administration of justice. (p 594 f-g)

[Application allowed with costs.]

Case(s) referred to:

Aw Sing Moey & Ors v. Melombong & Perumahan Sdn Bhd [1999] 4 CLJ 721 HC ***(foll)***

Carlingwood Motors Ltd v. Nissan Canada Inc [2001] ACWSJ 676321 ***(refd)***

Lee Kam Sun v. Ho Sau Lin & Anor [1999] 4 CLJ 507 HC ***(refd)***

Martin v. Gray 77 DLR (4th) 249 ***(refd)***

Prince Jefri Bolkiah v. KPMG (A Firm) [1999] 2 AC 222 ***(foll)***

Russel MvVeagh McKenzie Bartlect & Co v. Tower Corporation [1998] 3 NZLR 641 ***(refd)***

Suchy v. Zurich Insurance Co [1998] ACWSJ 662632 ***(refd)***

Yong & Co v. Wee Hood Teck Development Corporation [1984] 2 MLJ 39 ***(foll)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, r. 5(a), (b)(i)

Rules of the High Court 1980, O. 16 r. 4(4)

For the 3rd, 4th & 5th defendants - Colin Pereira (Cik Zuharina); M/s Goh Wong Pereira

For the 3rd party - Sri Dev Nair; M/s Sri Dev Naila

For the plaintiffs - Harjit Singh; M/s Gill & Tang

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin J:

This is an application by way of notice of motion on the part of the third, fourth and fifth defendants (hereinafter referred to as "the defendants") to disqualify Messrs. Sri Dev & Naila from representing the third party in this action (encl. 61).

As regards the court's jurisdiction I am of the view that this court has an inherent jurisdiction to hear such an application to disqualify a solicitor from acting for a particular party in the interest of justice. (See the case of *Lee Kam Sun v. Ho Sau Lin & Anor*. [1999] 4 CLJ 507).

The Grounds For The Application

It is not disputed that Mr. Sri Dev Nair of Messrs Sri Dev & Naila acts as counsel for the plaintiffs in the present case and for the plaintiffs in another related case in the Kuala Lumpur High Court suit D6-22-553-2001 involving parties that are almost the same as in the present case. The cause of action of the parties in these two related cases is focussed on the issue of a dispute over the rights of ownership of the Hollywood trade mark under a Distribution Agreement entered into by the parties on 6 July 2000.

It is also not disputed that the third party Uma Devi d/o Balakrishnan whilst being a director of the second defendant in the present suit had affirmed an affidavit on behalf of the second defendant's application for an injunction against the plaintiffs in the said suit D6-22-553-2001. The third party has, in the present suit in support of the plaintiffs' application for an interim injunction (encl. 2) alleged that the second defendant's application for an injunction in the said suit No. D6-22-553-2001 was "spurious" despite having affirmed the affidavit supporting the second defendant's application.

It is the contention of the defendants that Messrs. Sri Dev & Naila cannot act for the third party when Mr. Sri Dev Nair is acting for the plaintiffs in another related suit ("the first conflict"). It is also the contention of the defendants that Messrs. Sri Dev & Naila cannot act for the third party knowing that the third party has given conflicting evidence on oath in this suit and in suit D6-22-553-2001 ("the second conflict").

The First Conflict

It is my view that in any suit, the plaintiff and third party will be in conflicting positions. Order 16 r. 4(4) of the Rules of High Court 1980 ("RHC 1980") allows the court to give such directions to the third party to defend the suit whether alone or jointly with any defendant. The necessary consequence of O. 16 r. 4(4) of RHC 1980 is that the third party can, at the trial, cross-examine the plaintiffs and seek discovery against and interrogate the plaintiffs. In essence, the plaintiffs and the third party are on "opposing" sides much the same way as the plaintiffs and the defendants are on opposing sides. The position that the plaintiffs and the third party are on "opposing" sides, so to speak, is further evidenced by the fact that the third party notice (encl. 34) issued in this case is in accordance with Form 22 of RHC 1980 which states

that the third party is allowed to dispute the plaintiffs' claim against the defendants; or dispute the defendants' claim against the third party. Having established that the plaintiffs and the third party are on opposing sides, the issue that has to be determined by this court is whether Mr. Sri Dev Nair can continue to act for the third party when he also acts as counsel for the plaintiff, albeit it, in a different but related suit D6-22-553-2001.

The Second Conflict

The third party in the present suit has in a statutory declaration annexed to the affidavit in support of the plaintiffs' application for an interim injunction as in encl. 2 stated as follows:

> Angela in the meanwhile had been to see Ms. HH Goh & Company, solicitors who commenced KLHC Civil Suit No. D6-22-553-2001 on 5th April 2001 against Kayla and Kayla Group and also applied for an *ex parte* injunction on the same day to restrain from broadcasting the informecials on FTF and GCS II based on all the spurious documents specially made up for Quantum Malaysia.

However it is noted that in the said suit D6-22-553-2001, the third party had affirmed an affidavit supporting the second defendant's application for an injunction. It is clear that the third party is nothing more than a self serving witness who is prepared to give evidence for whichever party she is employed with. How could Mr. Sri Dev Nair represent the third party in this present suit when he acted for the plaintiffs in suit D6-22-553-2001 in which the plaintiffs resisted an injunction which was supported by the third party's affidavit, especially that now the third party has chosen to resile from her earlier evidence?

The Law

A) The Leading Case

The leading authority on conflicts is the decision of the House of Lords in the case of *Prince Jefri Bolkiah v. KPMG (A Firm)* [1999] 2 AC 222. The relevant facts of the case are as follows:

Prince Jefri was chairman of the Brunei Investment Agency (BIA) and for a period of 18 months had retained (in his personal capacity) KPMG to act for him or one of his companies in private litigation in which he was engaged. Prince Jefri was subsequently dismissed from his position as chairman of BIA and the Government retained KPMG to assist in the investigations into the conduct of the affairs of the BIA whilst Prince Jefri was Chairman. Notwithstanding the fact that KPMG took the view that there was no conflict, the firm erected an information barrier (Chinese Wall) around the department

within the firm carrying out the investigation into BIA. The issue raised in the said above mentioned case is whether KPMG could act for the Brunei Government to investigate BIA when it had previously acted for Prince Jefri, notwithstanding that KPMG had ceased acting for Prince Jefri; and the erection of the "Chinese Wall".

The House of Lords held that there was in fact a conflict. Applying the aforesaid principles to the present case, I am of the view there is no doubt that there is a conflict. Here, the situation is even more serious in that there is no question of a "Chinese Wall" as Mr. Sri Dev Nair acts personally for the third party in this case and the plaintiffs in suit D6-22-553-2001. Further, in the above case, the House of Lords held there to be a conflict notwithstanding that KPMG had already ceased acting for Prince Jefri. Here, suit D6-22-553-2001 is part heard and is still pending and Mr. Sri Dev Nair continues to remain as counsel on record.

B) The Malaysian Position

In the case of *Aw Sing Moey & Ors v. Melombong & Perumahan Sdn Bhd* [1999] 4 CLJ 721, the court held that counsel and his firm should be disqualified from acting for the plaintiff in the suit as counsel had advised other parties whilst in his previous firm. Applying the aforesaid principle in this case, again it is apparent that Mr. Sri Dev Nair's conflict is even more serious, in that he now acts for the third party whilst continuing to act for the plaintiffs in suit D6-22-553-2001, and as submitted, these suits are related. There can also be little doubt that Mr. Sri Dev Nair whilst acting for both the plaintiffs and the third party will come into confidential information.

In the Federal Court case of *Yong & Co. v. Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, it was held that being a common solicitor for different clients, was a conflict and the burden was on the solicitors to show that the conflicting interest did not prevent the solicitors from doing their duty. In applying the aforesaid principle, I find that Mr. Sri Dev Nair has not shown in anyway how he intends to avoid the obvious conflict. Further, since he acts personally in both suits, he cannot possibly erect a "Chinese Wall" between the information obtained from the plaintiffs in suit D6-22-553-2001 and information obtained from the third party in the present suit.

C) The New Zealand Position

In the case of *Russel MvVeagh McKenzie Bartlect & Co. v. Tower Corporation* [1998] 3 NZLR 641, the court in dealing with the issue of conflict of interest and the disclosure of confidential information inter alia had this to say:

> It is necessary to go back to the basic issue, which is the protection of confidential information from disclosure. In our view this issue should be addressed by the Court applying a principled approach, for which it is neither necessary nor desirable to lay down a series of propositions covering a variety of different hypothetical situations which are likely some time later to be found non-exhaustive. Three questions emerge. The first is whether confidential information is held which if disclosed is likely to affect the concerned (former) client's interests adversely. The second is whether in the particular factual circumstances, viewed objectively there is a real or appreciable risk that the confidential information will be disclosed. The third, which arises if the first two questions are answered affirmatively, is whether recognizing the significance and importance of the special fiduciary relationship which gives rise to the duty of protection the Court's discretionary power to disqualify should be exercised.
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> All these questions will frequently overlap. The nature and sensitivity of the information, the extent of the risk, and the adverse effect of possible disclosure are likely to affect all three inquiries. In making a final determination as to whether enjoinder in the nature of disqualification is appropriate, the Court will also need to take into account the competing factors of a person's right to the services of a solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally. Mobility within the profession, as it is sometimes termed, is relevant. Access to specialist services and market competition are also matters relevant to the public interest. A balancing exercise of this kind, which is mindful of the interests of all directly concerned, but does not undermine the integrity of the fiduciary relationship, is more like to meet the overall ends of justice than rigid rules imposed by the Court.
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> We would therefore reject the notion of an irrebuttable presumption, and also that of a rebuttable presumption. The preferable approach is the common sense practical one of assessing the evidence. The circumstances will dictate whether there is an unacceptable risk of disclosure of information. **Where there is possession of relevant information, in the absence of negating evidence of protection the Court will readily infer there is a risk of disclosure.** (emphasis added).

In the present case Mr. Sri Dev Nair has produced no evidence to rebut the inference that there will be disclosure. In fact, it is difficult to conclude otherwise, since he acts personally for both the plaintiffs and the third party.

D) The Canadian Position

In the case of *Suchy v. Zurich Insurance Co.* [1998] ACWSJ 662632, the British Columbia Court of Appeal held that where a lawyer seeks to act against his former client, the disqualification is automatic. The court went on to state *inter alia* as follows:

> In many ways, this is the plainest kind of case there could be. It is a case of an individual lawyer, having acted for the defendants, now prepares to act for the plaintiff. We have not been referred to any other case where the pattern is as clear as that.

Again, in my view in the context of the present case Mr. Sri Dev Nair's conflict is even more apparent as he seeks to act for both the plaintiffs and the third party in related cases and at the same time.

In the case of *Carlingwood Motors Ltd v. Nissan Canada Inc.* [2001] ACWSJ 676321, the issue arose as to whether solicitors for the plaintiff could continue to act for the plaintiff when the defendant was also a client of the said solicitors. It is pertinent to note that in this case there was no actual evidence that confidential information would pass. The Ontario Superior Court applied the principles of the *Prince Jefri Bolkiah*'s case, and held that given the nature of the relationship between the solicitors and the defendant (Nissan), there was a fiduciary relationship between the solicitor and the defendant which would give rise to a conflict if the said solicitors were to now act for the plaintiff. The court further went on to state as follows:

> As has been noted, this court's jurisdiction to remove lawyers from the record is not to be found in a code of conduct but in the fact that lawyers are officers of the court and their conduct on legal proceedings which may affect the administration of justice is subject to the court's supervisory jurisdiction.

In the case of *Martin v. Gray* 77 DLR (4th) 249, the appellant was represented by a solicitor who was later appointed to the bench. That solicitor was assisted by a graduate articled student. Two years later, the said articled student joined the firm representing the respondent. Despite the fact that there was no breach of confidence of the articled student, it was still held that there was conflict. Sopinka J reading out the judgment of the Supreme Court of Canada stated that:

> I conclude, as well, that to permit the plaintiff's law firm to continue to act in this case would be perceived by the public as placing the defendant in an unfair position when this action goes to trial. The *sina qua non* of the justice system is that there be an unqualified perception of its fairness in the eyes of the general public. In order to sustain that salutary precept, it is essential

> that the integrity and absolute independence of the courts and its *(sic)* officers be maintained in such a way as to assure a discerning public that the principle of equality before the law is not in danger of being comprised *(sic)*.
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> The door must remain firmly shut against any possibility of comprising *(sic)* that principal *(sic)*. To allow the plaintiff's law firm to continue to act in this case would open that door, albeit ever so slightly, to the possibility of compromising the impartial administration of justice – something which a court is duty bound to prevent.

Justice Sopinka went on to state:

> Nevertheless it is evident from this review of authorities that the clear trend is in favour of a stricter test. This trend is the product of a strong policy in favour of ensuring not only that there be no actual conflict but that there be no appearance of conflict.

As previously noted in the present case, there is not just a mere appearance of conflict but an actual conflict as Mr. Sri Dev Nair acts for both the plaintiffs and the third party.

The Statutory Position In Malaysia

Rule 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ("the said Rules") prohibits an advocate and solicitor from accepting a brief if it would be difficult for him to maintain his professional independence. Rule 5(b)(i) of the said Rules states that:

> An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

It is my view that there would be no prejudice to the third party in the event Mr. Sri Dev Nair and his firm are disqualified from representing her as she would be at liberty to retain other solicitors. Conversely, to allow Mr. Sri Dev Nair to continue to act for the third party would raise serious questions relating to a breach of confidence, conflict of interest and ultimately the due administration of justice.

For the above stated reasons it is my finding that Mr. Sri Dev Nair is in fact in a position of conflict. In the premise I hereby allowed the defendants' application with costs.